

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

REFIK MUSTIC

Claimant

v.

ASSOCIATED WHOLESALE GROCERS

Self-Insured Respondent

Docket No. 1,074,907

ORDER

Self-insured respondent, through Frederick J. Greenbaum, requests review of Administrative Law Judge Kenneth J. Hursh's January 7, 2016 preliminary hearing Order. Zachary K. Mark appeared for claimant.

ISSUES

Claimant alleges work-related injuries by repetitive trauma to his right arm, including his right shoulder, right elbow, hand and fingers. At the preliminary hearing, respondent accepted only claimant's right shoulder injury as compensable and agreed to provide medical treatment. The judge ordered payment of temporary total disability (TTD) commencing August 27, 2015.

Respondent argues there was no medical evidence showing claimant was temporarily totally disabled due to his right shoulder until November 19, 2015, such that the order for TTD should be modified as only being due from that day forward. Claimant contends the Board lacks jurisdiction to review the preliminary hearing Order and should dismiss it because respondent's appeal does not address any issues subject to review as set forth in K.S.A. 44-534a(a)(2). Alternatively, claimant maintains the Order should be affirmed.

The sole issue is: does the Board have jurisdiction to review the appeal?

FINDINGS OF FACT

Claimant has worked full-time for respondent for 11 years as an order filler. His job duties require use of both upper extremities, including repetitively lifting five to one hundred pounds from floor to overhead.

On October 31, 2014, claimant bumped his right elbow on a metal rack and had immediate pain. In his application for hearing, claimant alleged injury by repetitive trauma through such date involving his right arm, elbow, hand and fingers and he testified his work duties caused him to have right shoulder symptoms as well.

On October 31, 2014, respondent sent claimant to Concentra Medical Center (Concentra) for treatment. Claimant saw Temesgen Wakwaya, D.O., who recorded claimant having marked tenderness and swelling in his right elbow, weakened right hand grip and normal shoulder range of motion. Dr. Wakwaya diagnosed claimant with an elbow contusion, ordered physical therapy and advised claimant not to use his right arm. Respondent did not have light duty available and claimant was taken off work.

Claimant returned to Concentra on November 5, 2014, and saw Girma Assefa, M.D. Claimant reported improvement. Dr. Assefa noted claimant had decreased elbow range of motion with pain, normal grip strength and normal shoulder range of motion. Dr. Assefa restricted claimant against lifting over 15 pounds with his right hand, no pushing/pulling over 20 pounds with his right hand and limited use of his right arm and right hand. Respondent was able to accommodate these restrictions and claimant returned to work.

On November 12, 2014, claimant returned to Dr. Wakwaya reporting no change in symptoms. Dr. Wakwaya's examination showed normal elbow range of motion with pain, weakened right hand grip and normal shoulder range of motion. Dr. Wakwaya changed claimant's diagnosis to lateral epicondylitis and restricted him from any activity with his right hand. Respondent could not accommodate the restrictions. Claimant was taken off work.

Claimant returned to Dr. Wakwaya on November 19, 2014, reporting no pain. Dr. Wakwaya's examination revealed claimant's elbow range of motion, grip strength and shoulder range of motion were all normal. Dr. Wakwaya released claimant to regular duty. Claimant returned to work, but testified he continued having right shoulder problems.

Physical therapy records from November 3-19, 2014, report claimant had normal strength in his right shoulder on November 14 and 19. On November 19, 2014, a therapist noted claimant reported continued intermittent tightening in the right brachium (the upper segment of the arm extending from the shoulder to the elbow).

At claimant's attorney's request, Michael J. Poppa, D.O., evaluated claimant on August 27, 2015, for complaints involving his upper extremities. Regarding his right upper extremity, claimant completed a pain diagram showing a stabbing pain between his elbow and shoulder. Dr. Poppa stated claimant had not reached maximum medical improvement "involving his right arm, elbow, hand and fingers (overuse strain/cumulative trauma/localized olecranon pain/triceps tendonitis/forearm tendonitis/right upper extremity pain)." Dr. Poppa indicated claimant should remain off work until seen by an upper extremity specialist and was incapable of performing his work absent significant restrictions. Claimant did not work after August 27, 2015.

At respondent's request, Michael Hall, M.D., who is board certified in orthopedic hand and upper extremity microvascular surgery, evaluated claimant on November 19, 2015. Claimant complained of pain radiating from his right shoulder down to the brachium, which increased with overhead activities. Relevant to this claim, Dr. Hall diagnosed

claimant with right frozen shoulder and possible underlying impingement syndrome, as well as several other diagnoses. Dr. Hall opined only claimant's frozen shoulder was related to his work and all other diagnoses were not work related. Dr. Hall recommended an injection and therapy, followed by an MRI and possible surgical intervention. Dr. Hall restricted claimant against lifting above his waist or overhead.

In the January 7, 2016 Order, the judge stated:

The issue seemed to be whether Dr. Poppa's off work/restrictions opinion related to the shoulder as well as the other upper extremity conditions. [Dr.] Poppa's report did not specifically say "right shoulder," but did reference injuries affecting the "right arm" and "right upper extremity.[]" In a pain questionnaire completed by the claimant for Dr. Poppa with aid of an interpreter, the claimant marked stabbing pain . . . in the upper part of the right arm and a high degree of pain with overhead reaching and reaching behind his head.

Looking at the whole record, the court finds the claimant has been off work or subject to work restrictions for repetitive injuries to the right upper extremity, including the right shoulder, from August 27, 2015. The respondent has been unable to accommodate restrictions. The claimant qualifies for temporary total benefits from August 27.

The respondent shall pay the claimant temporary total disability at the rate of \$594 per week from August 27, 2015 until the claimant is released to return to work without restrictions, is returned to accommodated employment, or reaches maximum medical improvement for the right shoulder injury.¹

Respondent appealed.

PRINCIPLES OF LAW & ANALYSIS

K.S.A. 2014 Supp. 44-534a(a)(2) states, in part:

Upon a preliminary finding that the injury to the employee is compensable . . . , the administrative law judge may make a preliminary award of . . . temporary total disability compensation to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to . . . temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accident, repetitive trauma or resulting injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given, or whether

¹ ALJ Order at 2.

certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

K.S.A. 2014 Supp. 44-551(l)(2)(A) states, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a, and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.

“Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.”²

ANALYSIS

On an appeal from a preliminary hearing Order, the Board's jurisdiction is limited and it can review only allegations that the judge exceeded his or her jurisdiction under K.S.A. 2014 Supp. 44-551 and jurisdictional issues listed in K.S.A. 2014 Supp. 44-534a(a)(2). Under the latter statute, an award of temporary total disability is specifically within the judge's jurisdiction and not an issue appealable from a preliminary hearing.³

Respondent's appeal is dismissed because the Board lacks jurisdiction to review the Order. The Board would have jurisdiction to revisit the issue if it is contained in a final order or award.

CONCLUSIONS

The Board lacks jurisdiction to hear respondent's appeal.

WHEREFORE, respondent's appeal of the preliminary hearing Order is dismissed.

IT IS SO ORDERED.

² *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

³ See *Guy v. Harvey County*, No. 1,070,680, 2015 WL 2169369 (Kan. WCAB Apr. 8, 2015).

Dated this _____ day of March, 2016.

HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

ec: Zachary K. Mark
llivengood@markandburkhead.com

Frederick J. Greenbaum
fgreenbaum@mvplaw.com
jpearce@mvplaw.com
mvpkc@mvplaw.com

Honorable Kenneth J. Hursh